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No. 92

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

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On Writ of Certiorari to the Supreme Court of Appeals of Virginia

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## BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

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February 16, 1959

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### PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership of which embraces the members of the transportation and public utility regulatory commissions and boards of the several States of the United States except

Alaska. By the constitution of the Association its attorneys may be directed to participate on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which it is felt that participation on behalf of the Association should be made in the general public interest.

On November 20, 1958, the Association, in annual convention assembled, duly adopted the following resolution:

*Resolution Relating to the Service Storage and Transfer Company Case*

*Whereas,* There is pending before the United States Supreme Court a proceeding for review of an order of the Virginia Corporation Commission which held certain transportation services of the Service Storage and Transfer Company to be intrastate in nature; and

*Whereas,* The company claims such transportation between points in the State of Virginia to be interstate in nature by reason of routing such traffic across the state line and back into Virginia;

*Now, Therefore, Be It Resolved,* That the legal representatives of the National Association of Railroad and Utilities Commissioners are hereby authorized to participate in this proceeding on behalf of the Association in support of the jurisdiction of the state regulatory commission over the transportation involved.

This Association's interest in this proceeding is on behalf of the state commissions and boards represented in the membership of the Association, which agencies are charged by state laws with the duty of regulating the intrastate rates and services of the motor carriers operating in their respective states.

## STATEMENT OF THE CASE

There does not appear to be any dispute concerning the facts in the case.

The Service Storage and Transfer Co., Inc. (hereinafter referred to as "Service Company") was hauling property by motor vehicle between points of origin and points of destination both within the Commonwealth of Virginia. It did not have a certificate of public convenience and necessity issued by the State Corporation Commission of the Commonwealth of Virginia (hereinafter referred to as the "Virginia Commission") and required by the Code of Virginia as a prerequisite to engaging in the intrastate transportation of property by motor vehicle in Virginia.

Service Company admitted that it transported the shipments in question, but asserted that all shipments from Virginia origins to Virginia destinations were routed through Bluefield, West Virginia, and were performed under authority granted it in certificates issued by the Interstate Commerce Commission (hereinafter referred to as the "ICC").

By order dated February 26, 1957, the Virginia Commission found Service Company to be operating in violation of the Code of Virginia and a fine was levied.

On review of the Virginia Commission's order, the Supreme Court of Appeals of Virginia upheld the views of the Commission.

## STATEMENT OF INTEREST AND POSITION

The Association's interest in this proceeding arises not only because of the challenge to the police powers of the Commonwealth of Virginia but also because the pattern of operation evidenced herein is being repeated in other jurisdictions and the issue involved is in need of being resolved. State regulation of motor transportation is for the protection of the citizens of the respective states and the motor carriers duly certificated in the respective states. If federally certificated carriers can "tack" together several certificates and by the subterfuge of crossing the state line evade the exercise of police power by an individual state, then the effectiveness of state regulation is at an end. If federally certificated carriers can dilute intrastate business between points of origin and points of destination in the same state, then the state commission is at a loss to determine the public convenience and necessity to duly certificate intrastate operators. Nor can satisfactory experience be obtained under such circumstances for a state commission to properly and effectively fix intrastate rates and charges. Motor carriers creating such a situation should not be permitted to accomplish by indirection what they could not do directly.

This Association feels that the hand of state regulation should be upheld under these circumstances and that the order of the Virginia Commission and the action of the Supreme Court of Appeals of Virginia should be affirmed.

Pursuant to Rule 42 of the Revised Rules of the Supreme Court, consent of the parties to the filing of this brief as *amicus curiae* has been obtained.

## ARGUMENT

### I. The Operations in Question of Service Company Are Not Interstate Commerce Within the Meaning of the Term as Intended by Congress When It Enacted Part II of the Interstate Commerce Act.

Service Company represents that the questions presented in this proceeding are the following:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission.
>
> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution.
>
> "(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

All three of these questions raised by petitioner are completely irrelevant and, as stated, completely presuppose the real question in issue.

No one contends that a state may impose criminal sanctions on a carrier for conducting *interstate* operations certificated by the ICC. No one contends that a state may require a carrier to discontinue *interstate* operations conducted pursuant to a certificate issued by the ICC. No one contends that relief in the form of

discontinuance of *interstate* operations conducted pursuant to a certificate issued by the ICC must be sought elsewhere than from the ICC. None of these questions are presented herein.

The question presented here is whether a state may regulate operations by a motor carrier between points in that state when the transportation would normally and logically be performed within that state.

Petitioner contends here that to challenge state regulatory proceedings on the jurisdictional ground of "interstate commerce" must bring a complete and full halt to state regulation until the ICC passes on the question. Such a contention is a serious blow to our federal form of government and an injustice to the comity which must exist between the several levels of that government. Furthermore, such an overriding of state motor carrier regulation by federal authority was not provided for or intended by Congress when it enacted the Motor Carrier Act.

Section 202(a) of the Interstate Commerce Act provides:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission."

The meaning of this section is clear and unambiguous. The provisions of Part II of the Act apply to motor carriers engaged in bona fide interstate commerce and the regulation of motor carriers engaged in bona fide interstate commerce is vested in the Interstate Commerce Commission.

Section 202(b) of the Act provides:

> "Nothing in this part shall be construed to . . . interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Thus intrastate commerce within the Commonwealth of Virginia is within the exclusive exercise of the power of regulation by the appropriate agency of the government of Virginia; namely, the State Corporation Commission.

It logically follows that commerce wholly within Virginia, not being "interstate commerce," does not come within the provisions of this part of the Act and is not subject to ICC regulation.

But Congress did not stop here. In further clear and express language the legislators stated in Section 216(e):

> "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The regulation of intrastate *transportation* was left expressly to the several States.

In *Tucker* v. *Casualty Reciprocal Exchange,* 40 F. Supp. 383, 385, the Court quoted Section 202 (b) as support for the statement that:

> ". . . The Motor Carrier Act of 1935 is not only a case where Congress does not assume to occupy the entire and exclusive field of transportation by motor carriers, but on the contrary, evidences by

> explicit language an express intention to leave the intrastate commerce by motor carriers to the control of the several States. . . ."

This self-evident interpretation of the Act is further supported by a study of the legislative history of the Act. In the House Committee report (H. R. Rept. 1645—74th Congress) to accompany S. 1629—74th Congress, which became the Motor Carrier Act of 1935 (and Part II of the Act), it is stated:

> "S. 1629 fills the gap in motor carrier regulation as between the States. . . ."

The intention of Congress in framing the Motor Carrier Act was to fill "the gap in motor carrier regulation as between States", not to assume the whole field of regulation. Interstate Commerce Commission jurisdiction was to complement and not supplant that of the State regulatory bodies.

Petitioner's claim that interstate commerce has attached to the operations in question is based on its ICC certificates and declarations of the ICC under those certificates.

Service Company's ICC rights enable it to operate "(1) Between Bluefield, Va., and points and places within 5 miles of Bluefield, Va., and those within 5 miles of Bluefield, W. Va., respectively, *on the one hand*, and, *on the other* points and places in that part of Virginia and West Virginia within 75 miles of that territory." Under this certificate either the point of origin or the point of destination of a shipment must be Bluefield, Va., or Bluefield, W. Va., or a point within 5 miles of either.

Petitioner is also certificated by the ICC to conduct operations "Between Bluefield, W. Va., *on the one*

*hand,* and, *on the other* points and places in West Virginia . . . and . . . part of Virginia." Under this authority either the point of origin or the point of destination of a shipment must be Bluefield, W. Va.

Under either of these grants individually, the carrier could not perform the operations in question in this proceeding. Nowhere in either of the grants is the petitioner authorized to operate between the points in Virginia herein involved. Nowhere is it indicated that the ICC considered as to either grant the public convenience and necessity of conducting operations between the points in Virginia herein involved.

Petitioner justifies its operations under its interstate certificates by "tacking" together its authority from each grant, and thus accomplishes by indirection what it could not do directly.

Further, petition relies on a declaratory order of the ICC interpreting these certificates. It should be pointed out that the declaratory order of the ICC was issued March 29, 1957, over a month after the order of the Virginia Commission, dated February 26, 1957, which is under review herein and hence was not in existence when the matter was before the Virginia Commission.

Second, the ICC's declaratory order was apparently issued without hearing or investigation and solely upon the allegations submitted by petitioner. The order accordingly is qualified by the statement: "In the absense of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that the petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce." In short, the ICC order begs rather than

answers the question of whether the petitioner's operations are "a subterfuge to avoid State regulation" or are "a logical and normal operation."

As an example, from the present case, is the movement from Roanoke, Virginia, to Wytheville, Virginia. Both places are on U. S. Route 11, and the distance by that route is 81 miles. The circuitous route followed by Service Company was 155 miles. The declaratory order of the ICC does not show whether or not this specific route was before the ICC for consideration. The record fails to disclose that the ICC really believes that a carrier who was authorized to use either route might normally prefer to travel 155 miles over the mountains instead of 81 miles down the valley.

**II. Assuming, Arguendo, that the Operations in Question Contain Interstate Aspects, They are not such as to Displace the Local Nature of the Transportation and the Interest and Power of the State.**

As shown above, Congress in enacting the Motor Carrier Act did not pre-empt the whole field of regulation of transportation by motor vehicle.

This Court has long recognized that where a subject matter has interstate aspects but is clothed in local character, the states are free to exercise regulatory jurisdiction along with the federal government so long as there is no direct and irreconcilable conflict between the two and Congress has not pre-empted the field so as to supersede all state action. *Cooley* v. *Board of Wardens of Port of Phila.*, 12 How. 299(1852); *So. Carolina State Hy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177(1938); *State of Cal.* v. *Zook*, 336 U. S. 725 (1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329(1951).

In similar situations arising under the Federal Power Act and involving only *de minimus* interstate elements, this Court has rejected the assertion of federal jurisdiction which would oust State jurisdiction and transfer to federal authority the regulation of local matter, which Congress intended to leave in State control. *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 531. Such is the situation in the present case. *De minimus* interstate elements alone exist. The transportation in question conducted by Service Company is local in nature and not an integral part of any interstate commerce. This Court should reject at the outset, as it did in the *Connecticut Case,* any attempt to extend federal regulation so as to displace State regulation.

In *Central Greyhound Lines, Inc.* v. *Mealey,* 334 U. S. 653, Mr. Justice Frankfurter stated:

> "This case serves to remind once more that courts do not adjudicate abstractions, such as 'What is interstate commerce?' Also, it again illustrates that even if it found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause . . ." (p. 655)
>
> ". . . In a case like this nothing is gained, and clarity is lost by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation." (p. 661)

Directly in point with the instant case is the decision of this Court in *Eichholz* v. *Public Service Commission,*

306 U. S. 268(1939). In that case, a motor carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri routing it through Kansas City, Kansas. In upholding the jurisdiction of the State commission, this Court stated:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. *Hanley* v. *Kansas City Southern Ry Co.*, 187 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17; *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404. That fact, however, does not require the conclusion that the State's action for the protection of intrastate commerce was invalid. See *Lone State Gas Co.* v. *Texas*, 304 U. S. 224, 238. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

See also *P.S.C.* v. *Wycoff Co.*, 344 U. S. 237 (1952).

Returning to the present case what are the "legitimate interests" of the Commonwealth of Virginia in the transportation in question?

(1) The shippers are located in Virginia.

(2) The consignees are located in Virginia.

(3) The arrangements for transportation are made in Virginia.

(4) The transportation originates and terminates in Virginia.

(5) The carrier solicits business in Virginia.

(6) The transportation is performed in large part over the highways of Virginia.

(7) To the extent Service Company performs the transportation involved herein it diverts a volume of traffic otherwise available to haulers duly certificated intrastate by the Virginia Commission.

The above-enumerated "legitimate interests" of the Commonwealth of Virginia are certainly abundant to establish the local nature of the transportation and the fair demand by the State for jurisdiction over the transportation operations in question. This not only for the protection of the intrastate haulers in Virginia but also for the public in Virginia.

The opinion of the Supreme Court of Appeals of Virginia points out that it was "established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved." The Court then listed numerous instances of the circuitous routing pursued by Service Company "for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia." These holdings of the Court, clearly bring the situation within the Eichholz case, *supra*, wherein it was stated:

> "If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absense of an intrastate cer-

tificate, was an unwarrentable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." (p. 274)

## CONCLUSION

In view of the foregoing considerations, we respectfully urge that the judgment of the Supreme Court of Appeals of Virginia be affirmed.

Respectfully submitted,

AUSTIN L. ROBERTS, JR.
R. EVERETTE KREEGER

*Attorneys for the National Association of Railroad and Utilities Commissioners, amicus curiae*

February 16, 1959

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### Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first-class mail, postage prepaid, a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 16th day of February, 1959.

AUSTIN L. ROBERTS, JR.